VONG BAN HIN

v.

LAKSAMANA REALTY SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 12-64-2000]
30 APRIL 2003

CIVIL PROCEDURE: *Costs - Taxation - Getting-up fee - Plaintiff's costs for defendant's unsuccessful appeal against dismissal of defendant's application for judgment on admission of facts against plaintiff - Whether application for judgment on admission of facts under O. 22 r. 3 Subordinate Courts Rules 1980 akin to application for summary judgment under O. 14 or O. 81 Rules of the High Court 1980 or O. 26A Subordinate Courts Rules 1980 - Judge reviewing registrar's taxation of costs for getting-up - Whether registrar's award excessive*

CIVIL PROCEDURE: *Admission - Judgment on admission, application for - Whether analogous to application for summary judgment - Getting-up fee - Principles in awarding - Whether the same - Judge reviewing registrar's taxation of costs for getting-up - Whether registrar's award excessive - Subordinate Courts Rules 1980, O. 22 r. 3, O. 26A - Rules of the High Court 1980, O. 14, O. 81*

This was an application by the defendant pursuant to O. 59 r. 36(1) Rules of the High Court 1980 ('RHC') for a review of the final decision of the registrar awarding the plaintiff RM10,000 by way of costs for getting-up. The taxation of costs for getting-up had emanated from the defendant's unsuccessful appeal to the High Court against the decision of the sessions judge dismissing his application under O. 22 r. 3 Subordinate Courts Rules 1980 ('SCR') for judgment on admission of facts against the plaintiff.

In arguing that the award for getting-up was excessive, counsel for the defendant submitted that the registrar had failed to consider that the defendant's unsuccessful appeal was merely against the dismissal of an interlocutory application for judgment under O. 22 r. 3 SCR, which application was not unlike one for summary judgment under O. 14 or

O. 81 RHC or O. 26A SCR wherein no witnesses were called. Counsel for the plaintiff, however, argued that an application for judgment on admission of facts under O. 22 r. 3 SCR was not akin to an application for summary judgment; he further contended that the defendant's unsuccessful appeal had involved other issues such as *res* judicata and rectification, and thus the award of RM10,000 for getting-up was fair and reasonable.

Held:

[1] There are functional similarities between O. 22 r. 3 SCR/O. 27 r. 3 RHC on the one hand and O. 26A SCR/O. 14 RHC/O. 81 RHC on the other hand. The former enables the court to pronounce judgment by way of a summary procedure where there is no controversy due to an admission of facts. The latter empowers the court to grant summary judgment where there are no triable issues. Consequently, the principles governing the taxation of costs in respect of an application for summary judgment under O. 14 or O. 81 RHC are pertinent and would apply mutatis mutandis to an application for judgment on admission of facts under O. 22 r. 3 SCR. (p 134 b-d)

[2] Upon review, the plaintiff's taxed costs for getting-up was reduced to RM2,000. (p 135 d)

[Order accordingly.]

Case(s) referred to:

Aetna Universal Insurance Sdn Bhd v. Fire Accident & Marine Sdn Bhd [2001] 4 CLJ 753 HC ***(refd)***

Chen Teti v. Ornaresort Bhd [2003] 3 CLJ 91 HC ***(foll)***

Ellis v. Allen [1914] 1 Ch 904 ***(refd)***

Hunt v. RM Douglas (Roofing) Ltd [1988] 3 All ER 823 ***(refd)***

JP Finance (M) Bhd v. Tanswan Brothers Enterprise Sdn Bhd & Ors [1994] 3 CLJ 318 HC ***(foll)***

Liau Kim Lian v. Bajuria [1971] 1 MLJ 276 ***(refd)***

Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction & Engineering Works [1991] 1 CLJ 678; [1991] 1 CLJ (Rep) 346 SC ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Hj Abdullah Hj Sulaiman & Anor [1985] 2 CLJ 489; [1985] CLJ (Rep) 639 HC ***(foll)***

Raja Abdullah Wahman Raja Sulaiman v. Toplink Technologies Sdn Bhd [2003] 5 CLJ 263 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Rules of the Court 1980, O. 14, O. 27 r. 3, O. 59 rr. 34(1), 36(1), O. 81 r. 1(1)
Subordinate Courts Rules 1980, O. 22 r. 3, O. 26A

Other source(s) referred to:
KS Dass & Abdul Hamid Hj Mohamed, *Subordinate Courts Practice 1981*, pp 351 & 352
Malaysian High Court Practice 1998, Desk Edition MLJ, p 1276, para 2731

For the plaintiff - Chia Cheng Wee; M/s Anuar Hong & Ong
For the defendant - Shaari Nor; M/s Shaari Nor & Co

[For recent case on getting-up fee please see also Chen Teti v. Ornaresort Bhd [2003] 3 CLJ 91.]

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Review Of Taxation Of Costs

This is the appellant-defendant's (defendant's) application under O. 59 r. 36(1) of the Rules of High Court 1980 for a review of the decision of the learned registrar who had on 25 November 2002 awarded to the plaintiff a sum of RM10,000 by way of costs for getting up. The ground of this application before me is that the said award is excessive.

Background To This Application

The simple and straightforward background shows that the taxation of costs for "getting up" arose out of the defendant's appeal against the decision of the learned sessions court judge who had dismissed the defendant's application for judgment under O. 22 r 3 of the Subordinate Courts Rules 1980 purportedly on the ground of the admission by the plaintiffs counsel in his affidavit ("the said appeal").

The decision of the learned sessions court judge was affirmed by KN Segara J who on 16 February 2001 ordered that the defendant's appeal be dismissed with costs.

The bill of costs for taxation was heard before the learned registrar who on 29 September 2002 awarded RM10,000 by way of costs for getting up. There was a review under O. 59 r. 34(1) of the Rules of the High Court 1980 before the learned registrar who confirmed the said costs of RM10,000 on 25 November 2002.

Submission For Defendant

En. Shaari Nor, learned counsel for the defendant, submitted that the learned registrar has failed to consider that the appeal was against the dismissal of the defendant's interlocutory application in encl. (77) which he added resembled an application for summary judgment under O. 14 or O. 81 of the Rules of the High Court 1980 as no witness was called, and that the learned registrar has failed to take into account the decision in *JP Finance (M) Bhd v. Tanswan Brothers Enterprise Sdn Bhd & Ors* [1994] 3 CLJ 318 (HC). Learned counsel also relied on my judgment in *Chen Teti v. Ornaresort Berhad* [2003] 3 CLJ 91 which was delivered after the learned registrar's decision on the said costs.

Contention For Plaintiff

It was submitted by learned counsel En. Chia Cheng Wee for the plaintiff that the defendant's application under O. 22 r. 3 SCR is not an application for summary judgment, and that other issues raised included the doctrine of *res judicata* and rectification.

He added that the award by the learned registrar should not be disturbed unless he has erred in law as a matter of principle, and that he has applied the correct principles under O. 59 Appendix 1, Part X of the Rules of the High Court 1980, as a result of which the learned registrar has not erred in awarding RM10,000 as costs for the item of "getting up" which he submitted was fair and reasonable.

Decision Of The Court

Functions Of Review Judge

In deciding whether the taxed costs of RM10,000 could be considered as excessive, it is necessary to re-visit the case of *Chen Teti, supra*, where at pp. 94 to 100 I have the occasion to state in detail some principles of general application in relation to the functions of a judge hearing a review of taxation of the bill of costs under O. 59 r. 36(1), and the exercise of discretion by the learned registrar in this matter. I do not propose to repeat them here but to apply them in toto in this review.

Question For Determination

The question for determination in this review is whether an application under O. 22 r. 3 SCR can be classified as being identical to an application under O. 26A SCR (or O. 14 and O. 81 of the Rules of the High Court 1980) so that the principles governing the taxation of costs as enunciated in *JP Finance, supra,* and *Chen Teti, supra,* would apply.

Judgment On Admission Of Facts

This is regulated by O. 22 r. 3 SCR which reads as follows:

> **Judgment on admission of facts**
>
> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the court may give such judgment, or make such order, on the application as it thinks just.

In relation to O. 22 r. 3 SCR, the learned authors of "*Subordinate Courts Practice 1981"* by KS Dass and Abdul Hamid bin Haji Mohamed (now JCA) at pp. 351 and 352 said as follows:

A party applying for judgment under this rule must have a clear case similar to that of a summary judgment under O. 26A.

Order 22 r. 3 SCR has found an equipollent provision under O. 27 r. 3 RHC.

In *Perwira Habib Bank Malaysia Berhad v. Haji Abdullah bin Haji Sulaiman & Anor* [1985] 2 CLJ 489; ([1985] CLJ (Rep) 639) HC, at p. 492 (p. 641) the plaintiff applied under O. 27 r. 3 RHC on the ground that the solicitor's letter was an admissions of fact which entitled the plaintiff to a judgment or order. VC George J (later JCA) treated the application as an application to the court "to pronounce judgment by way of summary procedure provided by O. 27 r. 3".

The manifest purpose of O. 27 r. 3 is to enable a party in receipt of the admission of facts to apply for such judgment or order as he may be entitled to on the admission without waiting for any other question between them to be tried and to provide for "speedy judgment" where there is a plain admission: *Ellis v. Allen* [1914] 1 Ch. 904 at 909. (See p. 1276 para 2731 Malaysian High Court Practice 1998 Desk Edition MLJ; *Aetna Universal*

Insurance Sdn Bhd v. Fire Accident & Marine Sdn Bhd [2001] 4 CLJ 753 HC, following *Pembinaan KSY Sdn. Bhd. v. Syarikat Federal Furniture Construction and Engineering Works* [1991] 1 CLJ 678; [1991] 1 CLJ (Rep) 346 FC).

From the above authorities, it seems sufficiently clear to me that there is some similarity or at least a unity of purpose or a unity of identity between O. 22 r. 3 SCR (= O. 27 r. 3 RHC) and O. 26A SCR (= O. 14 or O. 81 RHC) as O. 22 r. 3 is intended to enable the court to pronounce judgment by way of summary procedure or a speedy judgment where there is no controversy of facts in view of the admissions, while O. 26A SCR, O. 14 or O. 81 RHC empowers the court to give summary judgment in the absence of triable issues.

In the circumstances, I answer the aforesaid question in the affirmative and so the costs awarded in O. 14 or O. 81 RHC proceedings would be relevant to this review and that the specific type of application is one of the decisive factors to be considered in the exercise of discretion in the taxation of a bill of costs. The learned registrar does not appear to have considered this principle in the exercise of his discretion.

Getting Up Costs For Successful Defendant In O. 14 Or O. 81 Application

In this connection, *JP Finance (M) Bhd, supra,* which has been referred to in the grounds of decision of the learned registrar is the case which is most closely connected and substantially similar to the instant case.

The facts in *JP Finance, supra,* revealed that the plaintiff's claim against the first defendant was in respect of a term loan of RM600,000, interest and costs, and against the second defendant on the written guarantee given by them in respect of the repayment of the loan, interest and costs and other related charges, all amounting to RM697,541.13. The learned registrar gave an O. 14 judgment against the second defendant. The appeal against the O. 14 judgment was allowed and the second defendant was given unconditional leave to defend as there was found to be a *bona fide* triable issue. The review sought was in respect of "getting up" the O. 14 application before the learned registrar who awarded RM12,000 as costs and "getting up" the appeal from the learned registrar's decision, and a sum of RM8,000 was awarded as costs.

Upon a judge's review, VC George J (later JCA) taxed off RM10,000 for the former and allowed RM2,000, while for the latter, a sum of RM6,500 was taxed off, thereby allowing RM1,500. For the judge's review, costs of RM250 had been allowed being the costs of drawing objections to decisions of the registrar, for drawing, issuing and filing of service of the summons to attend before the judge for review, for attending at the hearing of the review and "getting up" the objections and for the review.

In *Chen Teti, supra*, I held that an O. 81 application is analogous to and *sui generis* with an O. 14 application in that O. 81 r. 1(1) enables a plaintiff to apply to the court for summary judgment on the ground that the defendant has no defence to the plaintiff's action begun by writ endorsed with a claim for specific performance, rescission of an agreement or forfeiture or refund of deposit under the agreement.

In the circumstances, I am of the view that the aforesaid excerpt of the judgment in *JP Finance, supra*, in relation to an O. 14 application and my views in relation to an application under O. 81 in *Chen Teti, supra*, where the costs of RM18,000 was reviewed to RM2,000 would apply *mutatis mutandis* to an O. 22 r. 3 application.

Conclusion

Having regard to all the circumstances and the principles enunciated in *JP Finance, supra*, and *Chen Teti, supra*, I hereby allow this review and tax off RM8,000 from the taxed costs of RM10,000, thereby allowing a sum of RM2,000 as costs against the defendant.

Interest On Taxed Costs

The Federal Court in *Liau Kim Lian v. Bajuria* [1971] 1 MLJ 276, held that interest is payable where an order directs payment of costs to be taxed and that the interest is to run from the date of entry of judgment. (See also *Hunt v. RM Douglas (Roofing) Ltd* [1988] 3 All ER 823; and s. 11 of the Civil Law Act 1956 and *Raja Abdullah Wahman bin Raja Sulaiman (suing as a sole proprietor of Akitek Bersatu) v. Toplink Technologies Sdn Bhd* [2003] 5 CLJ 263 HC.)

In line with the Federal Court decision in *Liau Kim Lian, supra*, I also allow interest at 8% per annum on the costs of RM2,000 from the date of judgment ie, 16 February 2001 when the defendant's said appeal was dismissed, to the date of realisation and such payment to be made on or before 1 June 2003.

Cost For Defendant

For the defendant whose review is hereby allowed, I award costs of RM250 with interest at 8% per annum from the date hereof to the date of realisation, to be effected on or before 1 June 2003.